THE MADRAS LAW JOURNAL.

I] JANUARY [1939

RETIREMENT OF JUSTICE SIR C. MADHAVAN NAIR.

Sir C. Madhavan Nair has retired after a distinguished career in various exalted offices in the Bar and on the Bench. He joined the Madras Bar at a time when the great giants like the late Sir V. Bashyam Aiyangar, Sir C. Sankaran Nair, V. Krishnaswami Aiyar and P. R. Sundaram Aiyar were in active life and had their stimulating examples before him for learning and industry. From the very beginning he conceived a high sense of duty and this served him well in every walk of life. Our esteemed Advocate-General has, in his felicitous farewell speech the other day, borne ample testimony to his splendid work as a Professor of Law in the Madras Law College. Amidst the arduous professional work at the Bar he found time to discharge the duties as an Assistant Editor of the Madras Series of Indian Law Reports. His elevation successively to the posts of Government Pleader and Advocate-General was looked upon with satisfaction by the Bar to which he was always well disposed. Since 1924 he has been a Judge of the Madras High Court and has acted twice as Chief Justice.

As a Judge, his judgments were always marked by lucidity of expression and cogency of reasoning. He dealt fully with all the points advanced by the Bar before him whether of fact or law. We are sure that his decisions will be continued to be read with interest and profit not only for their learning but also for the dignity of their diction. He was uniformly courteous to the Bar and no member of the Bar entered his Court or came out of it without a feeling of pleasure and satisfaction.

This Journal has associations with his family from its inception, as his uncle the late Sir C. Sankaran Nair was one of its founders, and we have every reason to believe that he was always kindly disposed towards us. We wish him a long and happy life in his retirement amidst his literary and other useful avocations.

THE
MADRAS LAW JOURNAL.

I] JANUARY [1939

NOTES OF RECENT CASES.

Lakshmana Rao, J. Crl. R. C. No. 587 of 1938.
21st November, 1938.

Explosives Act (IV of 1884), S. 4—Construction—'Explosive'—If includes electric-sparklets.

The definition of 'explosive' in S. 4 of the Explosives Act is wide enough to include electric sparklets and the exemption of 'toy fire works' was removed by the amendment of the rules in 1917.

B. Jagannadha Das for Petitioner.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

G. S. V.

Venkataramana Rao, J. S. A. No. 990 of 1934.
28th November, 1938.

Evidence Act (I of 1872),—Suit by presumptive reversioner to declare a sale by widow as not binding on reversion—Statement by plaintiff reversioner in a prior suit as legatee—If admissible in this later suit as reversioner—Statement in prior suit by widow's mother-in-law—Admissible under S. 32 cl. (5) of the Evidence Act.

One *K* died leaving a widow *V* (1st defendant). *K* was the adopted son of one *S*. In a suit brought by *V* against *S*, the said *S* made a statement to the effect that *K* was understood to have taken a boy *N*, "son of *L*, who is a gnati and a cousin brother" of K in adoption. Pending the suit *S* died and the present plaintiff *Vi* was brought on record as legal representative as he was a legatee under a will of *S*. In that suit he adopted the contentions of *S*. Later *Vi* brought this present suit as reversioner against *V* for a declaration that a sale deed executed on her behalf by her father was not binding on him. *Vi* was an heir only as a bandhu. On the question whether there were nearer reversioners or not, the question was raised as to whether the statement of *Vi* in the prior suit adopting the statement of *S* that there was a gnati *L* was admissible in this suit.

Held, that the statement by *Vi* was then made as a legatee and that statement will not be admissible in this suit as a presumptive

reversioner but the statement of *S* will be admissible under S. 32 cl. (5) of the Evidence Act.

V. Govindarajachari and *B. Lakshminarayana* for Appellant.

S. V. Venugopalachari for *P. C. Parthasarathi Aiyangar* for Respondent.

G. S. V.

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Varadachariar and
Abdur Rahman, JJ.
29th November, 1938.

Appeal No. 25 of 1935.

Mesne profits—Hindu law—Widow—Alienation by—Death of widow—Suit for possession by reversioner questioning the alienation—Alienation found invalid—Conditional decree for possession on payment of binding portion of debt—If plaintiff entitled to mesne profits from widow's death or only from date of payment.

A reversioner sued for recovery of possession of properties of one *L*, who died in 1889 leaving behind a widow *S* who died in February 1926. The 1st defendant is the widow of a brother of *S*. She got the properties from her husband, who in turn had taken possession in execution of a foreclosure decree obtained by him against her sister (that is *S*) in O. S. No. 51 of 1903. The case of the reversioner was that the document (Ex. V) on foot of which O. S. No.51 of 1903 was filed was not binding on the reversioner and therefore the decree also. It was found that the decree in O. S. No. 51 of 1903 was not binding upon the plaintiff and that there was a debt binding on the estate for Rs. 900 on the date of Ex. V on which the estate was liable to pay a reasonable rate of interest (12 per cent). *S's* brother took possession in pursuance of the decree in 1905. The question was raised how far the defendant was entitled to interest on the binding portion of the debt; and as for mesne profits, if the plaintiff was entitled to mesne profits till the payment was made, as the decree is for possession only after payment.

Held, that after 1905, there is no justification for calculating any interest as against the estate up to the date of the widow's death. So that on the date of the widow's death the reversioner would have been entitled to demand possession subject to payment of the binding debt and interest up to 1905 thereon. As for mesne profits, in the case of a reversioner suing for possession on the ground that an alienee from the widow has not derived a title binding on the estate, the alienee must be treated as being in possession without title from the widow's death and entitled to mesne profits from that date, though on account of the law of limitation, the Court can award mesne profits only for three years prior to suit.

I.L.R. 35 Cal. 420, followed.

I.L.R. 41 All. 63, distinguished as an alienation by a Hindu father.

K. Kameswara Rao and *D. Narasa Raju* for Appellants.

B. Somayya for Respondent.

S. V. V.

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Varadachariar and Abdur Rahman, JJ.
8th December, 1938.

C. M. S. A. No. 56 of 1935.

Insurance policy—Assignment of—Endorsement, if an absolute present transfer—Validity of transfer—Decree against assets of assured—If policy amount assets of deceased—Bonus reserved to be paid to assured—Assets—Transfer of Property Act, S. 130—Absolute transfer—What is.

K is the widow of *K. R.* The said *K. R.* obtained an endowment policy in 1927 payable on 5th April, 1932 or on the death of the assured earlier. On 3rd July 1933 the assured assigned the policy by an endorsement on the policy itself. This assignment was duly communicated to the insurance company and there registered, though the company guarded itself by not admitting the validity of the assignment. The assured died in 1933. A decree was passed against *K* as the legal representative of *K.R.* against the assets of *K. R.* in the hands of *K.*

The decree-holder claimed to attach this policy as the assets of the assured. The endorsement on the policy was as usual and as follows :—"In consideration of natural love and affection, I do hereby assign the benefit of all moneys to become payable under the policy . . . . (reserving to myself the right to receive in cash or apply in reduction of premia any bonus that may be declared upon such policy from time to time) to my wife and declare that her receipt shall be a sufficient discharge to the company for the same, provided however that in the event of my wife predeceasing me or in the event of my surviving the date on which the said policy, if so expressed would mature, the benefit of the policy and the right to receive moneys thereunder shall revert to me as if this assignment had not been made".

Held, as the endorsement stated that the assured "doth hereby assign the benefit of all moneys, etc. to the wife, it was a complete endorsement passing a present interest in it to the assignee during his lifetime and not a mere power-of-attorney or a transfer *in futuro.*

(1917) 1 Ch. 1 and I.L.R. 2 Rang. 388 discussed and distinguished

The endorsement is a present transfer in favour of the assignee, though provision is also made for a reverter to the assignor in certain contingencies. The provision for reverter only emphasises the immediate operativeness of the transfer.

The transfer is also absolute and valid under S. 130 Transfer of Property Act. There is no possibility here of the transferor and transferee having fractional rights in the policy amount at one and the same time. So long as the transferee's interest exists, she has the whole interest and when the defeasance clause comes into operation, the interest of the person who takes under the defeasance clause is equally an absolute interest. *Bonus* is expressly reserved to the assignor so that any bonus not applied by the deceased for premia during his lifetime will be assets of the deceased. The policy amount is not *assets* of *K. R.* as it had become the property of *K* before *K. R.*'s death.

O. T. G. Nambiar and *N. T. K. Nambiar* for Appellant.

P. Govinda Menon for Respondent.

S. V. V.

Varadachariar and
Abdur Rahman, JJ.
9th December, 1938.

Appeal No. 82 of 1935.

Hindu Law—Trade started by father in a non-trading family—Debts incurred for such trade—If not binding on the sons.

A debt by a Hindu father in connection with a trade started by himself, when trade was not the normal occupation of the family, cannot be held to be avyavaharika debt so as not to bind the sons.

I.L.R. 49 Mad. 211 is not in this respect to be deemed to be overruled by I.L.R. 54 All. 564.

P. Satyanarayana Rao for Appellant.

K. Kotayya for Respondents.

S. V. V.

Varadachariar and
Abdur Rahman, JJ.
13th December, 1938.

A.S. No. 151 and 249 of 1936.

Hindu Law—Maintenance—Husband dying leaving a will—Will providing for a particular rate of maintenance—Court, if can interfere with such provision as inadequate—Widow living apart for no justifiable cause—No improper reason for her living apart—If she forfeits her right to future maintenance—Maintenance, if can be enforced against a legatee from her husband.

Where a person dies leaving behind a widow and a daughter and a will under which he has made some provision for the maintenance of the wife and the daughter, the Court's power to fix a reasonable maintenance is not taken away. The provision in the will can only be taken as a suggestion made by the husband as to what would be a reasonable provision for maintenance. Where therefore the Court finds that a provision in the will is inadequate, it is within the power of the Court to substitute a more reasonable provision.

Opinion of Cox, J., in 12 C.W.N. 808, approved.

The question whether a wife who, during her husband's lifetime, had lived apart from him without justifiable cause but for no improper purpose, forfeits her right to future maintenance for all time or is merely prevented from claiming separate maintenance during the time that she is living apart and if that claim can be enforced against a legatee from the husband left open.

I.L.R. 31 Mad. 338, approved.

55 M.L.J. 242 distinguished as a case of arrears of maintenance.

A.I.R. 1938 Mad. 914 distinguished as a claim by a daughter-in-law against a legatee of her father-in-law's self-acquired properties under a bequest.

G. Lakshmanna and *P. S. Ramachandra Aiyar* for Appellants in A. S. No. 249 of 1936 and Respondents in A. S. No. 151 of 1936.

P. V. Rajamannar and *K. Subba Rao* for Respondents in A. S. No. 249 of 1936 and Appellants in A. S. No. 151 of 1936.

S. V. V.

Lakshmana Rao, J. C. M. P. No. 3412 of 1938.
1st December, 1938.

Madras District Municipalities Act (V of 1920), Ss. 12, 49 and 51—Disqualification of a person under S. 49 (2) (c)—Election as Councillor and Chairman—Petition to set aside election as Chairman—Declaration of the other candidate as Chairman—Validity of—Proper procedure.

A who was disqualified for election as a Councillor under S. 49 (2) (*c*) of the District Municipalities Act, was returned as such and was later elected as Chairman of the Council by a majority. *B* who contested in the election of Chairman filed a petition before the Election Commissioner for a declaration that the election of *A* as Chairman was void and that he was duly elected as Chairman. The election of *A* as Chairman was set aside and *B* was declared duly elected.

Held, that a separate petition to set aside the election of *A* as Chairman was unnecessary as under S. 12 (4) the Chairman is deemed to vacate office on his ceasing to be a Councillor. The petition to the Election Commissioner can be treated as a petition to set aside the election of *A* as a Councillor but a declaration that *B* was the duly elected Chairman cannot be granted in such a petition.

K. S. Jayarama Aiyar, G. Gopalaswami and *Yusuf Sait* for Petitioner.

T. M. Krishnaswami Aiyar and *B. Pocker* for Respondent.

G. S. V.

Varadachariar and Appeal No. 111 of 1934.
Abdur Rahman, JJ.
15th December, 1938.

Hindu Law—Adoption—Consent of sapinda—Consent obtained on condition that his share in the joint family should not be affected by the adoption—If valid—Consenting sapinda, if can question validity of his consent.

When a sapinda in giving his consent to an adoption by the widow protects himself from loss by stipulating that the adopted son should not claim a share in the joint family property in the enjoyment of such sapinda, whether the consent of the sapinda so given is to be treated as given from corrupt or improper motives or not, it is not open to the consenting sapinda himself to plead invalidity of the adoption on that ground. The adopted son having changed his status on the faith of the authority conferred on the widow to take him in adoption as the result of the sapinda's consent, it is not open to that very sapinda to call in question the validity of the consent. The case is analogous to one in which a widow representing herself to have been authorised by her husband to make an adoption takes a boy in adoption; and in this class of cases it is settled that the widow will be precluded from question-

ing the validity of the adoption made by herself on the representation that she had her husband's authority.

B. Jagannadha Das for Appellant.

B. V. Ramanarasu for Respondent.

S. V. V.

Madhavan Nair and Stodart, JJ. C. M. P. No. 5016 of 1938 and C. R. P. No. 26 of 1939.

12th January, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Application under—Proper Court to entertain.

The explanation of the expression "Court which passed the decree" in S. 20 equally applies to S. 19. The Court contemplated in S. 19 is the Court which passed the decree that is the Court of first instance. So an application under S. 19 should be made to the Court of first instance.

P. V. Vallabhacharyulu for Petitioner.

A. Satyanarayana for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 169 of 1935.

12th January, 1939.

Insolvency—Suit on a mortgage by the mortgagee—Final decree for sale—Subsequent adjudication of mortgagor as an insolvent—Official Receiver not made party in execution—Execution sale and purchase by a stranger in good faith—Subsequent sale of the same property by the Official Receiver—Purchaser from the Official Receiver gets title to the equity of redemption—Civil Procedure Code (V of 1908), O. 21, r. 22—Provincial Insolvency Act (V of 1920), S. 51

Where subsequent to the final decree and order for sale in a mortgage suit, the mortgagor is adjudicated as an insolvent, but in ignorance of the insolvency, the Official Receiver is not brought on the record in execution and the property is sold in execution and bought by a *bona fide* purchaser, he does not get a good title to the equity of redemption as against the Official Receiver or a purchaser from him subsequent to the execution sale.

I.L.R. 42 Cal. 72 and I.L.R. 59 Mad. 461, followed.

For this purpose, it does not make any difference that the decree is a mortgage decree and not a money decree as in the above cases.

32 I.C. 489, followed.

The fact that the execution purchaser bought the property in good faith and without knowledge of the insolvency will not protect his purchase under S. 51 (3) of the Provincial Insolvency Act, as this provision has reference to a stage prior to the adjudication.

(1938) 1 M.L.J. 471, followed.

C. A. Seshagiri Sastri for Appellant.

T. M. Krishnaswamy Aiyar and *A. Balasubramanya Aiyar* for Respondent.

K. C.

Wadsworth, J. S. A. No. 235 of 1935.
16th January, 1939.

Evidence Act (I of 1872), S. 157—Deed not inter partes—*Recital of boundary in—Executant of document examined as a witness—Admissibility of the recital.*

A recital of a boundary in a document between third parties is not ordinarily admissible to prove possession or title against a person who is not a party to the document. But when the executant of a document not *inter partes* containing a recital of boundary is a witness in a case, the recital of boundary can be let in evidence under S. 157 of the Evidence Act, as a former statement corroborating the deposition. The statement that a certain person was in possession of the land on a certain boundary is a contemporaneous statement regarding the occupation of the land in the boundary.

44 C.L.J. 582, relied on.

R. Rangachariar for Appellant.

S. Ramanujachariar for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. C. R. P. No. 1436 of 1936.
19th January, 1939.

Evidence Act (I of 1872), Ss. 24, 25 and 26—Applicability—Inquiry on complaint—Admission of liability before police officer—Admissibility.

Where a complaint was made before an Inspector of Police and in an enquiry made thereon, the defendant was alleged to have made an admission of liability to the Police Officer who recorded it, the recorded admission is admissible in evidence in a civil suit and Ss. 24, 25 and 26 of the Evidence Act are not applicable.

V. G. Row for Petitioner.

Respondent not represented.

G. S. V.

Varadachariar and Gentle, JJ. Appeal No. 128 of 1935.
23rd January, 1939.

Transfer of Property Act (IV of 1882), S 53—Mortgage in fraud of creditors—Contemporaneous advance—If mortgage good to that extent.

If a transaction offends S 53 of the Transfer of Property Act, it cannot be ordinarily upheld even to the extent to which it may be found to be supported by consideration, because, whatever may be the importance of the question of consideration, when dealing with the question of fact, namely, whether the transaction

N.R.C.

was one that offended S. 53 or not, it has little bearing once the conclusion is reached that the transaction does offend S. 53. An exception has however been made in the transferee's favour in cases in which any part of the consideration for the document has been applied in the discharge of pre-existing secured debts, and it has been held that the transferee might in such cases be entitled to the benefit of the doctrine of subrogation. A distinction is also suggested between sales and mortgages and it has been held that whereas a sale might have to be wholly set aside if it offends S. 53, a mortgage might be upheld as a valid security to the extent of the debt actually due on the date of the mortgage. But no case has gone the length of holding that even when there was no pre-existing debt, the mere fact that some consideration passed under a mortgage which is found to be in fraud of creditors would justify the view that the mortgage can be held to be a valid security to the extent of the contemporaneous advance.

46 M.L.J. 125, doubted and distinguished.

Ch. Raghava Rao for Appellant.

K. V. Krishnaswami Aiyar and *P. N. Appuswami Aiyar* for Respondents.

S. V. V.

Varadachariar and Gentle, JJ. Appeal No. 159 of 1935.
24th January, 1939.

Limitation Act (IX of 1908)—Partnership—Acknowledgment made by one partner—If sufficient acknowledgment.

An acknowledgment made by one partner on whom a demand was made, and who held the largest interest in the business and was also conducting the business is sufficient acknowledgment binding on the other partners also.

I.L.R. 41 Mad. 427, followed.

S. Venkatesa Aiyangar for Appellants.

T. V. Ramiah and *King and Partridge* for Respondents.

S. V. V.

Pandrang Row, J. C. M. P. Nos. 4775 and 5376 of 1938.
24th January, 1939.

Madras Local Boards Act (XIV of 1920), S. 55 (2) (c)—Completion of work undertaken—Money claim against a person under a security agreement—If amounts to subsisting contract.

A person contracted to perform a major work for a District Board and executed a bond to the President for a certain sum as security for the due performance by him of the contract. The work was completely performed to the satisfaction of the Board before the date of his nomination and no claim could be made on

the ground that the contract had not been duly performed. The only subsisting contract is a contract whereby the Board is permitted to recover under the security agreement from the deposit made by him such amount as is covered by any objection that may be made by the Audit Department.

Held, that the person is not disqualified for election, as the money claim that may possibly be made is not a contract of the kind contemplated in S. 55 (2) (*c*) of the Madras Local Boards Act. A contract which had ceased to be enforceable and under which no claim can be made by either party cannot be regarded as a 'subsisting contract'.

V. T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Petitioners.

K. Rajah Aiyar for Respondents.

G. S. V.

Wadsworth, J. S. A. No. 161 of 1936.
25th January, 1939.

Madras Local Boards Act (XIV of 1920), S. 79, cl. 3—Zamindari villages—Quarries, fisheries and pasture—Levy of local cess in respect of income—Principle of double assessment.

Lands containing quarries and pasturage situated within and occupied by the Zamindar in certain villages were assessed to local cess by the Local Board under S. 79 (3) of the Madras Local Boards Act. It was contended for the Zamindar that lease of quarry meant sale of corpus and did not amount to income, and that non-agricultural income was not liable to local cess under the Act in as much as income-tax was in any event levied.

Held, that such income became liable to assessment to cess in accordance with the strict construction of S. 79 (3) of the Madras Local Boards Act and that the levy should be upheld in spite of the hardship caused by double taxation.

I.L.R. 34 Cal. 257 and I.L.R. 50 All. 98, referred to.

Held, further, that the income realised from fisheries in the estate though previously assessed to income-tax also became liable for the levy of cess as fisheries constitute 'land' for purposes of the Act.

63 M.L.J. 634 (F.B.), explained.

Leave granted.

The Government Pleader (B. Sitarama Rao) for Appellant.

K. Someswara Rao and *Y. Govindarajulu* for Respondent.

B. V. V.

Varadachariar and Gentle, JJ. Appeal No. 178 of 1935.
25th January, 1939.

Specific performance—Contract to sell—Failure of vendee to ay—A term lease by vendor to raise money for filing suit for specific performance—If itself a bar to suit—Readiness of vendor to perform—Meaning of—Alternative claim for damages—If sustainable.

A agreed to sell a piece of land to *B* for Rs. 9,000. He received Rs 100 by way of advance and it was agreed that the balance should be paid within one month and the transaction completed. As the sale deed was largely for discharge of debts of *A*, it was agreed that the balance after payment of debts should be paid before the Sub-Registrar at the time of registration. As a lease was outstanding, the contract provided that possession should be delivered to the vendee after the expiration of the lease-period. As for nearly a year, the sale deed was not executed, *A* arranged to file a suit for specific performance and for that purpose raised Rs. 1,000 by a munigutta lease under which the transferee was to be in possession for 12 years to get the advance of Rs. 1,000 liquidated. As *B* pleaded that by virtue of this munigutta lease, *A* disabled himself from carrying out the contract, the suit must fail. *A* got a release from lessee that he had given up his rights under it but as tenants had raised crops on it, they should be allowed to harvest that season. *A* also claimed damages and *B* pleaded that if *A* had disentitled himself to claim specific performance by his own conduct, the claim for damages also cannot be sustained under S. 19 of Specific Relief Act and I.L.R. 52 Bom. 597.

Held, that so far as claim to damages that there is a distinction between a claim to damages on the footing that the contract had been broken by the defendant and the breach had been accepted by the plaintiff and a claim to damages as merely an alternative to a claim for specific performance as in this case. In such a case as held in I.L.R. 52 Bom. 597 the claim to damages is not sustainable as an independent claim. As for the other ground of unreadiness and incapacity to perform his part of the contract,

Held, that the execution of munigutta lease cannot of itself be held to show that *A* was not ready and willing. If *A* entered into the transaction of munigutta lease showing an intention to abandon the contract or treat it as at an end, it may be he is not entitled to specific performance. But otherwise the question will be one of fact whether by such transaction he has incapacitated or disabled himself and therefore evidence must be taken to decide the question.

V. Subramaniam for Appellant.
V. Govindarajachari for Respondent.
S. V. V.

Madhavan Nair, J. S. A, No. 383 of 1935.
18th January, 1939.

Transfer of Property Act (IV of 1882), S. 58 (d)—Usufructuary mortgage—Period of redemption fixed—Mortgagor's undertaking to pay the amount—If a personal covenant.

Where a mortgage deed recites that the mortgagee shall hold and enjoy the property as *otti* for 3 years and fixes the period to redeem the lands after payment of the amount due on the mortgage and the amount of expenses incurred by mortgagee for levelling in respect of the land and further the mortgagor undertakes to pay the amounts,

Held, that the document embodies a personal covenant to pay the money.

I.L.R. 56 Mad. 892, referred to.

R. Sethurama Sastri for Appellant.

T. L. Venkatarama Aiyar for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. C. R. P. Nos. 28 and 86
18th January, 1939. of 1937.

Civil Procedure Code (V of 1908), O. 47, r. 1—Error apparent on face of record—Case wrongly dismissed for default—Application for review—Maintainability.

A plaintiff appeared but failed to produce his evidence and asked for adjournment. The Court purported to dismiss the suit under O. 9, r. 8, Civil Procedure Code, for default. An application for review was made.

Held, that the Court should have proceeded to decide the suit under O. 17, r. 3 and this is an error apparent on the face of the order, and is a sufficient ground on which review can be granted.

T. K. Srinivasa Thathachariar for Petitioners.

T. Kumaraswami Aiyah for Respondents.

G. S. V.

Varadachariar and Gentle, JJ. A. S. No. 109 of 1935.
19th January, 1939.

Association—Meeting—Notice given of a resolution—Amendment moved at the meeting—Want of notice in respect of—Amended resolution passed at the meeting—Interference by Court.

Notice was given of a resolution to be moved at the general body meeting of an Association registered under Act XXI of 1860 in compliance with the requirements of law and rules framed by it. An addition to the resolution was brought up before the

meeting and was moved by way of an amendment and the Chairman held it was only explanatory of the new proposition and not an additional matter and the resolution as amended was passed.

Held, when a question of sufficiency of notice is raised, the point for consideration is not how the matter was understood by those present but how it might have been understood by such of the members as did not happen to attend the meeting.

(1868) 5 Eq. 450 at 481, referred to.

The rule as to notice is intended to ensure the ascertainment of the views of the majority and if the notice is defective it cannot be assumed that those who attended the meeting formed an absolute majority of the members or that any resolution passed at the meeting necessarily represented the wishes of such majority. The Court will interfere with such irregularity and declare that so much of the resolution as was newly introduced was not duly passed and the minority should have an opportunity of having the subject duly considered at a meeting of the members after proper notice.

K. Rajah Aiyar and *S. V. B. Rao* for Appellants.

B. Sitarama Rao and *P. Panini Rao* for Respondent.

G. S. V.

Burn and Lakshmana Rao, JJ. C. C. C. A. No. 74 of 1935.
25th January, 1939.

Limitation Act (IX of 1908), Arts. 62, 120, 123 and 144—Suit by heir on death of prior legatee for partition—Property in the hands of tenant for true owner—Limitation for rent.

C was entitled to a share in the suit properties on the death of *N*. After *C's* death, the plaintiff brought a suit claiming the share to which *C* was entitled and rent. One of the tenants, who was a defendant, was in actual possession on behalf of the true owner after the death of *N*.

Held, that as regards relief for partition Art. 144 applies and not Art. 123 and the period runs from the date of death of *C*. As regards relief for rent, Art. 120 applies and not Art. 62.

I.L.R. 14 Cal. 801, distinguished.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellant.

P. V. Rajamannar, K. Subba Rao, A. V. Avudainayagam and *V. P. Chakravarthi* for Respondents.

G. S. V.

Pandrang Row, J. C. M. P. No. 1979 of 1938.
25th January, 1939.

Madras Hindu Religious Endowments Act (II of 1927), S. 65-A (5) (b)—Appeal under, fully heard—Adjournment for passing final orders to a certain date—President alone adjourning the case to a prior date "for orders"—Appellant not given notice of this date—Judgment delivered by Full Board—Members of the Board not sitting together when passing orders—Validity of judgment.

An appeal to the Board under Chapter VI-A of the Madras Hindu Religious Endowments Act was fully heard by the Full Board and was adjourned to 21st April for final orders. On 4th April it was posted to 12th April "for orders" by the President of the Board and on the 12th April the orders were passed by the Full Board dismissing the appeal. The appellant had no notice of the date on which the judgment was to be pronounced.

Held, that the procedure followed by the Board cannot be said to offend against any fundamental rule of natural justice or equity. The Board is not bound to follow the rules of the Civil Procedure Code or the rules contained in the Rules of Practice. The mere fact that the final order was passed by the Board without giving notice of the date on which the order was to be pronounced and the members of the Board did not actually sit together when signing the judgment or order does not render the judgment invalid or contrary to law.

T. M. Krishnaswami Aiyar and *S. Ramanujam* for Petitioner.

The Advocate-General (Sir A. Krishnaswami Aiyar), V. V. Chowdary and *M. Seshachalapathi* for Respondent.

G. S. V.

Burn and Lakshmana Rao, JJ. C. C. C. A. No. 38 of 1937.
26th January, 1939.

Presidency Small Cause Courts Act (XV of 1882), S. 28—Superstructure which can be removed by tenant—If movable property—Suit to set aside claim order in proceeding arising in execution of a Small Cause Court decree—Cognisability by City Civil Court—Madras City Civil Courts Act, S. 5—Scope.

A decree-holder in a small cause suit sought to attach the superstructure which the defendant, a tenant, would be entitled to remove without the permission of the landlord before the termination of the tenancy. A third party preferred a claim to it which was allowed. A suit was filed in the City Civil Court to set aside the order on the claim petition.

Held, that the superstructure must be deemed to be movable property falling within S. 28 of the Presidency Small Cause Courts Act. The City Civil Court has no jurisdiction to try the suit, as the question arose in execution of the Small Cause Court decree. There is no distinction between questions arising 'in' execution and questions arising 'out of' execution of a Small Cause Court decree.

S. 5 of the Madras City Civil Courts Act does not enable the City Civil Court to entertain suits which are cognisable by the Small Cause Court.

I.L.R. 39 Mad. 219 (F.B.), referred to

25 L.W. 115, relied on.

V. Krishnamachariar for Appellant.

Rangaswami Aiyangar and *Ramaratnam* for 1st Respondent.

G. S. V.

Wadsworth, J. S. A. No. 197 of 1934.

30th January, 1939.

Malabar Law—Acquisition of properties in names of sisters out of brother's funds—If joint tenancy or tenancy-in-common created—Inference of benami as regards beneficial interest in property and share in it.

Properties were acquired in the joint names of three sisters in a Malabar Marumakkathayam family with the funds which were supplied by their brother. The lower Court held that the three sisters held the properties as to three-fourths of their value beneficially and as to one-fourth of their value as benamidars for their brother and the three sisters took as joint tenants with right of survivorship in favour of themselves and their brother or as members of a *tavashi* with the incidence of impartibility.

Held, that a joint tenancy with right of survivorship is not created. It cannot be inferred that there is no tenancy in common from the fact that the three sisters were made joint holders of the property in the document of title. A document may convey a beneficial title as to one item, while being a benami transfer as to another item included in the genuine deed in order to defeat creditors. But persons in whose favour a single property has been transferred cannot take a beneficial interest in that property, while at the same time constituting themselves benamidars in an undivided and unspecified share in favour of the person who provides the funds.

P. Govinda Menon for Appellant.

K. Kuttikrishna Menon for Respondents.

G. S. V.

Burn, J. C. R. P. No. 180 of 1938.
6th January, 1939.

Companies Act (VII of 1913), Ss. 28 (2) and 30 (1)—Person subscribing for shares in the memorandum of association—No allotment of shares—Liability for value of shares.

Where a person subscribed for 20 shares in the memorandum of association and the prospectus contained a statement that a certain number of shares were subscribed by the signatories to the memorandum and allotted and there was no resolution in the minutes book of directors allotting shares to the persons concerned,

Held, that as there was no valid allotment of shares no liability to pay the value of the shares arose.

V. T. Rangaswami Aiyangar and *K. Venkateswaran* for Petitioner.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Respondent.

G. S. V.

Venkataramana Rao, J. C. C. C. A. No. 43 of 1936.
11th January, 1939.

Madras Marumakkatayam Act (XXII of 1933), S. 5 (2)—Marriage between a Brahmin and a Nair lady—Validity of—Benefit under the Act—If can be renounced by declaration.

A Brahmin by birth, following the Hindu religion and having already a wife, married a Nair lady belonging to a tarwad of Malabar and it was alleged that the latter by a declaration renounced the Marumakkatayam Law and the benefit conferred by the Madras Marumakkatayam Act by going through the form of marriage and that the marriage must be deemed to be valid.

Held, that it was not open to a private individual to get rid of the statutory prohibition which is enacted in the Act by a mere declaration that he or she did not intend to be governed by the Act and the marriage is invalid.

K. Rajah Aiyar and *G. N. Thirumalachari* for Appellant.

O. T. G. Nambiar for Respondent.

G. S. V.

Abdur Rahman, J. C. M. A. No. 214 of 1938.
24th January, 1939.

Civil Procedure Code (V of 1908), O. 39, r. 1 (a)—Application by defendant—Competency.

N.R.C.

An application under O. 39, r. 1 (*a*) of the Civil Procedure Code can be made on behalf of a defendant who is entitled to come to the Court if any such act as is referred to in the rule is committed by the plaintiff.

G. N. Chari for Appellant.

M. Patanjali Sastri for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. C. R. P. No. 1012 of 1936.
31st January, 1939.

Civil Procedure Code (V of 1908), S. 73—Decree for sale on mortgage—If a decree for payment of money.

A decree for sale on a mortgage cannot be regarded as a decree for payment of money within S. 73 of the Civil Procedure Code.

I.L.R. 49 Mad. 598, applied.

M. Patanjali Sastri for Petitioner.

V. Ramaswami Aiyar for Respondent.

G. S. V.

Leach, C. J. and Somayya, J. S. A. No. 430 of 1934.
2nd February, 1939.

Court-Fees Act (VII of 1870), S. 7 (v) and Sch. II, Art. 17-B —Prior mortgagee becomes purchaser of portion of property—Subsequent mortgagee becoming purchaser of the entire property subject to the early mortgage—Prior mortgagee obtaining symbolical possession—Suit for partition against subsequent mortgagee remaining in actual possession—Proper court-fees.

A obtained a mortgage decree in respect of the western portion of a house and at the subsequent sale in execution became the purchaser thereof. *B* who held a second mortgage over the whole house obtained a mortgage decree in respect of the whole house and in execution thereof became the purchaser, subject to *A's* right. *A* was put in symbolical possession of his half portion of the property. *B* who was in physical possession of the whole of the property, refused to allow *A* to enter into physical possession of his portion. A suit was brought by *A* for partition of the property and possession of his half share—and also for mesne profits.

Held, that the plaint should be stamped under S. 7 (*v*) and not Art. 17-B of Sch. II of the Court-Fees Act.

K. Balasubramania Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

T. Krishna Rao for *The Government Pleader* on behalf of the Government.

G. S. V.

Wadsworth, J. S. A. No. 275 of 1935.
2nd February, 1939.

Limitation Act (IX of 1908), Arts. 120 and 131—Applicability—Remuneration attached to office—Suit against Government to establish right to office—Nature of—Commencement of limitation.

In a dispute as regards mutawallship of a mosque the second defendant was registered in revenue records of Government, as the holder of the office. A suit for a declaration that the plaintiff was the duly appointed mutawalli, yeomiadhar and Katheeb of the mosque, and also for the relief, that the first defendant, the Secretary of State should be directed to register the plaintiff as the yeomiadhar entitled to receive the yeomiah allowance and pay such allowance was brought within a period of six years of the date on which the Board of Revenue finally rejected the plaintiff's application for registration

Held, that the essential claim in the suit is the establishment of the title of the plaintiff to the office to which a remuneration is attached and not the establishment of the liability of the Government to make the recurring payment; Art. 131 does not apply. The right to sue under Art. 120 accrues when the Government recognised the 2nd defendant as the holder of the office entitled to receive the emoluments and not when the plaintiff's final appeal to the Board of Revenue was rejected.

39 M.L.J. 492, applied.

A.I.R. 1938 Mad. 47, discussed.

Leave to appeal granted.

B. Pocker for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

G. S. V.

Leach, C. J. and Somayya, J. C. M. P. Nos. 5512, 5513 and
8th February, 1939. 5514 of 1938.

Civil Procedure Code (V of 1908), O. 45, r. 4—Scope—Two different suits tried together—A common question existing for them—Permission for consolidating the suits—If can be granted.

Two different suits which had a common question were tried together in the trial Court; but there were separate judgments. The appeals against them were heard together and dealt with in one judgment. An application was filed for consolidating the two appeals. The suits, if consolidated, would comply with the condition with regard to value.

Held, that the fact that there is a common question does not entitle the petitioner to a certificate permitting an appeal, when there are other questions which are not common and the application does not come under O. 45, r. 4. Under O. 45, r. 4, the Court has got a discretion and is not bound to grant an order for consolidation.

T. R. Venkatarama Sastri and *B. V. Visvanatha Aiyar* for Petitioner.

A. Srirangachariar for Respondent.

G. S. V.

Lakshmana Rao, J. Cr. R. C. No. 835 of 1938.
9th February, 1939.

Motor Vehicles Rules of 1928, Rr. 175 and 176—Driver of bus—Liability for overloading.

The driver of a motor bus is not mentioned under Rr. 175 and 176 of the Motor Vehicles Rules of 1928 and cannot be made liable for the offence of overloading and for violating the condition of the 'G' permit issued under the Motor Vehicles Rules of 1923, regarding the maximum number of passengers that can be carried in a bus.

A. S. Sivakaminathan for Petitioner.

V. L. Ethiraj (*Public Prosecutor*) for the Crown.

G. S. V.

Burn and Stodart, JJ. C. M. A. No. 376 of 1937.
2nd February, 1939.

Execution—Execution proceedings—Permission of Court to sell property privately—Sale in pursuance of—Sale proceeds not deposited within stipulated time but deposited later on—Sale set aside—Amount deposited and drawn out by the decree-holder—Necessity to refund before execution.

In execution of a decree obtained by the Government against *A*, the properties belonging to *A* were attached and brought to sale. *A* sought the permission of the Court to sell his properties privately and deposited the decree amount in Court. The Court granted permission to *A* to sell the properties on condition that he deposited a certain amount immediately and on his undertaking to deposit the balance within a stipulated time. In pursuance of the permission *A* sold the property to *B* and deposited a portion of the amount as per the order of the Court but failed to deposit the balance within the stipulated time. The Government after drawing the amount deposited in Court filed an application praying for the sale of the property already attached. The lower Court set aside the sale on the ground that there was not a strict compliance with the order of Court but directed the Government to restore the money which it took from Court. Against that the Government preferred an appeal. *B* filed an application to be impleaded as a party respondent to the appeal and he was brought on the record.

Held, on appeal, that the order of the lower Court was correct and that the Government was bound to deposit back the money.

The Government Pleader (*B. Sitarama Rao*) for Appellant.

M. Krishna Barathi for Judgment-debtor.

A. S. Srinivasa Aiyar and *S. Seshadri* for the party Respondent.

S. V. V.

Leach, C. J. and Somayya, J. L. P. A. No. 117 of 1936.
6th February, 1939.

Hindu Law—Joint family—Separate property—Dispute as to—Onus of proof.

Where the income from the family properties was not sufficient to maintain the family and the father utilised part of his salary for that purpose and claimed certain items of properties as his separate properties as having been acquired from savings representing the accumulation of the balance of his salary and asserted his rights over them,

Held, that the onus is not on the earning member of the joint family to show that he kept his earnings separate but is on the

other members to prove that the earning member had relinquished his right over his separate income. As this onus was not discharged, the properties claimed by the father constitute his separate properties.

S. Panchapagesa Sastri and *P. J. Kuppanna Rao* for Appellant.

L. A. Gopalakrishna Aiyar for Respondent.

G. S. V.

Pandrang Row, J. C. R. P. No. 806 of 1938.
16th February, 1939.

Madras Estates Land Act (I of 1908), S. 205—Revision by District Collector—Order wrong on merits—Interference by High Court under S. 115, Civil Procedure Code.

A petition was filed before a Deputy Collector under Ss. 131 and 192 of the Estates Land Act and S. 47, Civil Procedure Code, to declare a certain sale held in execution of a rent decree, a nullity. The Deputy Collector did not deal with the petition judicially as required by law but in a purely administrative manner and dismissed the petition. The District Collector on revision interfered with the order under the power vested in him under S. 205 of the Act.

Held, that though the order of the District Collector may be wrong on the merits he has jurisdiction to entertain a revision petition and the High Court will not interfere with that order in revision under S. 115, Civil Procedure Code.

T. Kumaraswamiah for Petitioner.

P. Gopolaratnam Naidu and *P. Srikantam* for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. S. A. No. 348 of 1935.
20th February, 1939.

Limitation Act (IX of 1908), S. 6 (3) and Art. 144—Sale of minor's property by Court guardian—Death of minor—Suit for possession by legal representative within three years from—Adverse possession of defendant for more than twelve years—Effect.

The Court guardian of a minor conveyed a certain plot of the minor's property comprised in certain boundaries to *B* in 1912. The minor died while still a minor and was succeeded by his mother as his heir. The mother claimed recovery from *B* of the extent alleged to have been encroached upon by *B* after his purchase in 1912. The suit was brought in 1931, within three years of the death of the minor, the last proprietor.

Held, the suit cannot be held to be barred in spite of the adverse possession of *B* beyond a period of 12 years.

P. Somasundaram for Appellant.

Kasturi Seshagiri Rao for Respondent.

G. S. V.

Leach, C.J. and Somayya, J. C. M. P. No. 551 of 1939.
22nd February, 1939.

Civil Procedure Code (V of 1908), O. 40, r. 1—Partition suit—Appointment of receiver—Sale by direction of Court—Proper notice to be given by receiver.

In a suit for partition of the properties of a joint Hindu family a receiver was appointed to sell a portion of the lands allotted to one of the members to discharge his liability. The receiver gave a week's notice of the sale, and held it.

Held, that the receiver should, unless there are special circumstances or he is otherwise directed by the Court, follow the rule laid down in the Civil Procedure Code, and give not less than thirty days' notice, though the parties may agree to a lesser period.

K. Rajah Aiyar and *N. A. Krishna Aiyar* for Petitioner.

T. R. Venkatarama Sastri, S. Ramanujam, T. R. Srinivasa Aiyangar, S. Venkatarama Aiyar, A. V. Viswanatha Sastri, K. R. Rangaswami Aiyangar, K. Krishnaswami Aiyangar and *G. Jagadisa Aiyar* for Respondent.

G. S. V.

Krishnaswami Aiyangar, J. S. A. Nos. 471 to 473 of 1935.
23rd February, 1939.

Madras Estates Land Act (I of 1908), S. 3 (ii)—Suit for rent under S. 77—Land occupied by houses though alleged by the landholder to be ryoti—No proof of payment of rent—Burden of proof.

Where the land was originally cultivable land but ceased to be used for agricultural purposes and was occupied by houses, though there is no proof of the consent of the landholder to this arrangement,

Held, that the fact that the rent was not paid goes a long way to support the inference that the occupation of the land by houses was with the consent of the landholder.

Held, further, that it was incumbent upon the plaintiff in order to establish his claim for rent to prove that the land is ryoti land and that the money which he claims is rent within the definition in S. 3 (*ii*) of the Madras Estates Land Act.

(1938) 2 M. L. J. 829, followed.

V. Ramaswami Aiyar and *N. G. Krishna Aiyangar* for Appellants.

A. S. Srinivasa Aiyar and *S. Seshadri* for Respondents.

S. V. V.

Gentle, J. S. A. No. 510 of 1935.
23rd February, 1939.

Civil Procedure Code (V of 1908), S. 47 and O. 21, r. 95—Bar of suit—Mortgagee purchasing properties in pursuance of mortgage decree—Defendant purchasing those properties in execution of another decree subject to mortgage subsequent to mortgage suit—Application against defendant to remove obstruction—Dismissal of, on ground of limitation—Suit against defendant for possession—Proper procedure.

A, a mortgagee, purchased properties mortgaged to him in a sale held in pursuance of the mortgage decree obtained by him. In execution of a Small Cause Court decree passed against the mortgagor subsequent to the mortgage decree in the mortgage suit, the mortgaged properties were put up for sale and purchased by *B*, subject to the mortgage. A filed a petition under O. 21, r. 97, Civil Procedure Code, to prevent resistance caused by *B* and to gain possession and the petition was dismissed not on merits but as being barred under Art. 167 of the Limitation Act. *C* acquired the properties from *A* and brought a suit for possession against *B*.

Held, that *B* was a representative of the party to the suit within the contemplation of S. 47 (1) of the Civil Procedure Code, and the suit brought by *C* is barred. *C* was entitled to take proceedings under O. 21, r. 95 of the Civil Procedure Code, as the continuance by *B* in occupation of the premises is a wrong *de die in diem* and *C* should be granted leave under S. 47 (2) to treat the proceedings in the suit as an application under O. 21, r. 95, Civil Procedure Code.

(1937) 2 M.L.J. 359 (P.C.), relied on.

I.L.R. 1938 Bom. 649, followed.

B. Pocker and *T. R. Abdul Ghani* for Appellant.

N. Panchanatha Aiyar and *R. Krishnaswami Aiyar* for Respondent.

G. S. V.

Varadachariar and Gentle, JJ. Appeal No. 443 of 1935.
3rd February, 1939.

Hindu Law—Debts—Member of agriculturist family engaging in trade—Possibility of loss—Debts incurred if avyavaharika.

The fact that a member of an agriculturist family engages in trade will not itself make the debts incurred by him *avyavaharika*. The possibility of loss sometimes accruing will not make the debts arising as a result of trade, illegal or immoral debts, within the meaning of the Hindu law.

K. Venkatarama Raju for Appellants.

G. Lakshmanna and *G. Chandrasekara Sastri* for Respondents.

G. S. V.

The Chief Justice and Somayya, J. C. M. S. A. No. 166 of 1936.
9th February, 1939.

Provincial Insolvency Act (V of 1920), S. 28 (2)—Joint Hindu family—Insolvency of father—Attachment of son's shares before the sale thereof by Official Receiver—Power of Official Receiver—Leave of Insolvency Court—If necessary for valid attachment.

The father of a joint Hindu family was adjudicated an insolvent. Before the Official Receiver sold the shares of the sons for the benefit of the creditors, those shares were attached in execution of a decree obtained by their creditors.

Held, that S. 28 (2) of the Provincial Insolvency Act refers only to the property of the insolvent. Proceedings can be taken in respect of the sons' interest in the family property without the leave of the Insolvency Court and as a result of the attachment, the Official Receiver loses the power to sell the property of the sons for the lawful debts of the insolvent father.

I.L.R. 51 Mad. 342, 66 M.L.J. 277 and C. M. A. No. 253 of 1936, relied on.

(1938) 1 M.L.J. 824, disapproved.

M. Patanjali Sastri and *T. K. Sundararaman* for Appellant.

M. Murugappa Chettiar, K. Sankara Sastri and *T. M. Ramaswami Aiyar* for Respondents.

G. S. V.

Krishnaswami Aiyangar, J. S. A. No. 756 of 1935.
20th February, 1939.

Co-owner—Purchaser at auction of unspecified share—Suit against other co-owners for partition and possession—Mesne profits during period of exclusion—If can be awarded—Nature of relief to be granted.

N R C

A purchased in Court auction the undivided share of *G* and his sons in two items of properties. The balance of the shares in these items was owned by *C* and *D*, strangers to the family. After his purchase *A* obtained symbolical possession through Court and brought a suit for partition and recovery of his share in the two items together with past and future mesne profits. *C* and *D* who were in physical possession of the properties received and appropriated the entire profits to themselves. The lower Court refused to give a decree for mesne profits during the period *A* chose to be inactive.

Held, that *C* and *D* were only ordinary co-sharers or tenants in common. *A* had a right to joint possession, though not entitled to any specific items of the common properties. Though mesne profits may not be awardable *A* was entitled to relief by way of profits or compensation. There is no scope for the doctrine of laches or waiver.

I.L.R. 27 All. 88 and I.L.R. 28 All. 161, relied on.

A. C. Sampath Aiyangar for Appellant.

Respondent not represented.

G. S. V.

[F.B.]

The Chief Justice, Krishnaswami Aiyangar and Somayya, JJ. C. R. P. No. 898 of 1938.

3rd March, 1939.

Court-Fees Act (VII of 1870), S. 7 (iv-A) and (v)—Suit for cancellation of a deed and possession—Court-fee payable—Proper mode of valuation.

A suit for the cancellation of a deed of conveyance and for possession of properties, should be valued under S. 7 (iv-A) of the Court-Fees Act but the stamp fee must be based on the market value of the properties at the time of the suit and not on the amount stated in the conveyance.

I.L.R. 59 Mad. 240, approved.

I.L.R. 53 Mad. 267 and I.L.R. 56 Mad. 212, overruled.

V. Subramaniam for Petitioner,

Y. Suryanarayana and *T. Krishna Rao* for *B. Sitarama Rao* (*The Government Pleader*) for Respondents.

G. S. V.

Varadachariar, J. C. R. P. No. 685 of 1937.
21st February, 1939.

Madras Estates Land Act (I of 1908), S. 20-A—Application under—Doctrine of res judicata—*Applicability of.*

Applications of the kind contemplated by S. 20-A of the Estates Land Act are matters to which the doctrine of *res judicata* cannot be legitimately applied. If an application under that section is dismissed by the Collector it will only be on the ground that as circumstances have not changed and no special cause is shown, there is no reason for changing his opinion.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Petitioner.

V. Viyyanna and *G. Srinivasa Aiyangar* for Respondents.

G. S. V.

Wadsworth, J. C. R. P. No 624 of 1936.
24th February, 1939.

Civil Procedure Code (V of 1908), O. 9, r. 9 and S. 141—Pauper petition—Dismissal for default—Petition under O. 9, r. 9, and S. 141—Duty of Court.

Where a petition is filed under O. 9, r. 9 and S. 141, Civil Procedure Code, on the dismissal for default of a pauper petition the Court has a duty to decide such petition on its merits and cannot decline to exercise its jurisdiction merely because there is an alternative remedy.

36 L.W. 586, relied on.

A. Rajagopala Aiyar and *P. G. Raghavendra Rao* for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

G. S. V.

Wadsworth, J. C. R. P. No. 427 of 1936.
24th February, 1939.

Civil Procedure Code (V of 1908), O. 21, rr. 11 and 17—Execution petition—Decree-holder or person duly authorised not signing it—Evidence to show that the person signing was an authorised agent—Admission of petition as being in proper form—Rejection at later stage for not being verified by an authorised agent—Proper procedure.

An execution petition was filed by a rival decree-holder, claiming rateable distribution within the time allowed by S. 73 of the Civil Procedure Code. The petition was not signed by the decree-holder or a person shown to have been duly authorised by

him. No objection was taken to the frame of the petition. The petitioner adduced evidence that the person who signed and verified the petition was a partner in his firm and his authorised agent. In the later stage, the Court held it was no valid execution petition by the claimant.

Held, that the petition could not be held to be not a petition in substantial compliance with the requirements of the law and could not be dismissed as not having been verified by an authorised agent. As the petition was once treated as one in proper form it could not be rejected without giving to the petitioner an opportunity of supplying the deficiency. The petitioner was given an opportunity for the production of further evidence.

2 Lah. L. J. 104, relied on.

Ch. Raghava Rao for Petitioner.

G. Krishna Arya for Respondent.

G. S. V.

Wadsworth, J. S. A. Nos. 785 and 786 of 1935.
28th February, 1939.

Provincial Insolvency Act (V of 1920), S. 44 (1)(c)—Applicability—Forbearance to claim rights in insolvency—Fraud of insolvent—Nature of.

To bring a debt within the exception of S. 44 (1) (*c*) of the Provincial Insolvency Act, it is incumbent on the claimant to prove that there was an intentional forbearance on his part brought about by a fraud on the part of the insolvent and it is not enough to show that the insolvent's conduct was generally fraudulent (*e.g.*, in the matter of alienations in anticipation of insolvency) and that the creditor's failure to prove was due to the absence of assets, which assets might possibly have been present had the insolvent conducted himself in a more honest manner.

V. Govindarajachari and *B. V. Ramanarasu* for Appellants.

Y. Ramaseshiah for Respondents.

G. S. V.

Wadsworth, J. S. A. No. 658 of 1935.
9th March, 1939.

Madras Hereditary Village Offices Act (III of 1895), Ss. 13 and 21—Plaintiff appointed as village headman by Revenue Divisional Officer and Collector—Board of Revenue appointing another—Plaintiff in possession of the office—Suit for declaration and injunction—Jurisdiction of Civil Court — Regulation I of 1803, S. 5—Power of superintendence of the Board of Revenue under—Nature of.

The plaintiff was originally appointed by the Revenue Divisional Officer and the Collector to the Office of a Village headman in a Government village, as having a better claim to the office than his rival, and he entered upon the duties of the office and was occupying it. The Board of Revenue set aside the order appointing the plaintiff and appointed the second defendant to the office as being a more desirable candidate. The plaintiff brought a suit for a declaration that he was the legal holder of the office and the appointment of the second defendant was illegal and to restrain the Government and the second defendant from interfering with his enjoyment of the office.

Held, that the Civil Court has jurisdiction to entertain the suit as the plaintiff seeks to avert a threat to his possession of the office by an unlawful act of the Board of Revenue. The order of the Board of Revenue purporting to act in second appeal or revision under S. 5 of Regulation I of 1803 and to decide a matter which according to the machinery of the Madras Hereditary Village Offices Act should have been decided by a suit under S. 13 of the Act was an illegal attempt to invade the vested rights of the plaintiff and he has a remedy by way of a suit for the relief asked for.

Obiter.—The Board of Revenue can set aside a statutory order of its subordinate in the case of a gross error attended by serious consequences for which no other remedy is provided by law, but not where the consequences are purely personal to the rival claimants.

58 M.L J. 698, I.L.R. 56 Mad. 749 and 33 L.W. 294, referred to.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Appellant.

B. Sitarama Rao (The Government Pleader), V. Krishnamachariar and *P. G. Raghavendra Rao* for Respondents.

G. S. V.

Burn and Stodart, JJ. R. T. No. 12 of 1939.
9th March, 1939.

Evidence Act (I of 1872), S. 30—Co-accused—Confession at preliminary enquiry—Admissibility against the other co-accused.

Where a confession was made by an accused implicating his co-accused for the first time at the preliminary enquiry, in the dock in the presence of the latter and at the Sessions trial it was proved under S. 287 of the Criminal Procedure Code, by the Magistrate's *verbatim* record of it,

Held, that as the co-accused had as much opportunity of explaining or rebutting the incriminating statement as if it had been made before the preliminary enquiry and proved at that enquiry and is in no way prejudiced, it can be taken into account.

R. Sadasivan Pillai for the Accused.

A. S. Sivakaminathan for *V. L. Ethiraj* (*The Public Prosecutor*) on behalf of the Crown.

G. S. V.

Wadsworth, J. C. M. P. No. 4070 of 1938 in
13th March, 1939. S. A. No. 358 of 1934.

Madras Agriculturists Relief Act (IV of 1938), S. 4 (d)—Two separate plots included in a mortgage—One of them with building in it—The other being a vacant site at the time of mortgage—House constructed later on—If it is house property—Mortgage debt—If comes within the operation of the Act.

Two plots separately demarcated were comprised in a mortgage. In one of them when the mortgage was executed, there was a shop building. The other was a vacant site (*Kali manai nilam*) though destined for building purposes. A house was constructed on it since the mortgage came into force.

Held, that the vacant site cannot be properly described as 'house property' and the inclusion of the unoccupied land takes the mortgage debt out of the exception recited in S. 4 (*d*) of the Act and the debt as a whole comes within the mischief of the Act.

Even if land is suitable for building purposes and there is an intention to build houses upon it, it would not be considered "house property" until building operations had at any rate started.

7 I.C. 436, referred to.

A. S. Srinivasa Aiyar and *S. Seshadri* for Petitioner.

V. Ramaswami Aiyar for Respondent.

G. S. V.

Burn and Stodart, JJ. R. T. No. 21 of 1939.
14th March, 1939.

Penal Code (XLV of 1860), S. 302—Murder—Recommendation for reduction of sentence under R. 260 of the Criminal Rules of Practice—Sentence of death—If appropriate.

Where a Sessions Judge sentenced a woman to death for the murder of her new born infant and addressed the Government recommending that the sentence be reduced to a term not exceeding five years' rigorous imprisonment,

Held, that if the case of the accused was one which the Judge thought should be dealt with under R. 260 of the Criminal Rules of Practice, by reduction of a sentence, the sentence of death was quite inappropriate.

G. Balaparameswari Rao for Accused.

V. L. Ethiraj (*The Public Prosecutor*) for the Crown.

G.S.V.

Varadachariar and Gentle, JJ. Appeal No. 194 of 1935.
9th February, 1939.

Negotiable Instruments Act (XXVI of 1881), S. 118—Evidence Act, S. 114—Execution of promissory note—Presumption as to consideration—Plaintiff suing on the note—Proof as to her inability to advance the amount recited in the note—Duty of the Court to examine transaction and ascertain the true consideration.

Where evidence has been given by a plaintiff suing upon a bill or note in which the consideration is in issue, the Court is entitled to consider the whole of the evidence given during the trial and the defendant is entitled to rely upon the facts disclosed in the plaintiff's evidence and is not confined to his own and his witnesses' testimony. Although there is a presumption that a note has been given for consideration, there is no presumption as to the quantum. Even when the instrument contains a recital regarding the amount of consideration, this is *prima facie* evidence only of such amount and does not prevent an examination by the Court of the transaction to see what the actual consideration was. The creditor is entitled to get what he can prove to have lent, "by affirmative evidence beyond the production of the note itself".

Where it is proved that the payee of a promissory note was not in a position to lend the amount recited in the note and further there is no evidence or proof of the actual amount of the advance, if any, which she made at that time, she (the payee) suing on the note is not entitled to succeed in her claim.

I.L.R. 58 Mad. 841 at 855; *Jones* v. *Thomas,* (1877) 2 Y. and C. Ex. 498 at 522: 160 E.R. 493; 31 I.C. 739 and 29 M.L.J. 236, relied on.

P. Satyanarayana Rao for Appellant.

V. Govindarajachari and *B. V. Ramanarasu* for Respondents.

G. S. V.

Somayya, J. C.R.P. Nos. 295, 296 and 297 of 1936.
13th February, 1939.

Inam—Suit by zamindar against inamdar and his tenants for water taken for second crop from his tank—Liability of inamdar—Nature of—Jurisdiction of Revenue Court—Madras Estates Land Act, S. 70—Claim of zamindar against inamdar if one against a ryot.

The tenants who cultivated certain inam land under an inamdar were taking water for the first crop and also whenever available for the second crop from a zamindar's tank. The zamindar brought a suit against inamdar and the tenants in respect of water taken for the second crop raised on the suit land. The rent demanded by the inamdar from his tenants was fixed on the basis that

there would be enough water for the first crop and also for a second crop whenever rains fail.

Held, that though the entire liability to pay for the water was thrown on the tenants as between the inamdar and the cultivating tenants, the zamindar is not bound by such stipulations and the inamdar is jointly liable along with the tenants to pay for the water taken for the second crop. There is no distinction in the application of this principle between a pre-settlement inam and a post-settlement inam. The zamindar's suit cannot be viewed as a claim on a tort but is based on an implied engagement between him and the inamdar that whenever there is water available, the inamdar may take the water but on condition of paying for it.

The suit for the recovery of payment for water against the inamdar or against the other tenants is not one for recovery of rent from a 'ryot' as defined in S. 77 of the Madras Estates Land Act and does not lie in the Revenue Court.

Ch. Raghava Rao for Petitioner.

T. Satyanarayana and *M. Appa Rao* for Respondents.

G. S. V.

Krishnaswami Aiyangar, J. S. A. No. 778 of 1935.
20th February, 1939.

Transfer of Property Act (IV of 1882), Ss. 41 and 115—Gift by husband to wife of certain property—Sale of the same property by him to plaintiff—Plaintiff alleging that vendor's wife took prominent part in the negotiations preceding the sale—Suit by plaintiff for declaration and injunction—Wife if barred from setting up her title to the property—Nature of estoppel under Ss. 41 and 115.

Certain property originally belonged to the second defendant who executed a deed of gift in favour of his wife, the first defendant. The second defendant sold the property to the plaintiff without any mention of the above deed of gift. The plaintiff obtained possession of the property. The first defendant subsequently sold the property in favour of the third defendant. The plaintiff then brought a suit for a declaration of title to the suit property and an injunction to restrain the defendants from interfering with her enjoyment of that property. The plaintiff deposed during the trial that the first defendant along with her husband took part in the negotiations which preceded the purchase and she took part in the settlement of the price andkept back from her (the plaintiff) the knowledge of the gift deed and her title under it. The plaintiff contended that the first defendant was estopped from putting forward her title by reason of her conduct in connection with the purchase of the property by her (the plaintiff). The

lower Courts held that there was no estoppel under S. 41 of the Transfer of Property Act inasmuch as the plaintiff must be deemed to have had constructive notice of the gift which was a registered document by reason of the definition of 'notice' in S. 3 of the above Act.

Held, that the conclusion so far as S. 41 of the Act is correct. But if the conduct of the first defendant was such as was deposed to by the plaintiff, it was not a case of a person merely standing by, but it was a conduct which amounted to representation which had been acted upon by the plaintiff to her prejudice. A perfect case of estoppel would then be made out under S. 115 of the Transfer of Property Act, though this ground of estoppel falls outside S. 41 of the Act,

I.L.R. 56 All. 582, relied on.

S. Panchapagesa Sastri and *T. G. Raghavendra Rao* for Appellant.

T. E. Ramabadrachari and *K. Rama Aiyangar* for Respondent.

G. S. V.

Wadsworth, J. C. R. P. No. 981 of 1936.
20th February, 1939.

Succession Act (XXXIX of 1925), S. 304—Certain creditors of deceased intermeddling with his estate—Distribution of assets by them among creditors—Right of creditor not receiving payment in that distribution—Liability of creditors to refund—Extent of.

Certain creditors of a deceased person took possession of his stock-in-trade and paid their own debts and certain other debts due by him. A creditor who was not paid sued them and the widow of the deceased.

Held, that these creditors are executors *de son tort*. To the extent they have paid valid debts of the deceased proportionately to the assets available, these payments have been made 'in due course of administration.' They should be directed to pay to the plaintiff only the rateable amount which would have been due to him had his debt been taken into consideration at the distribution of the assets amongst the creditors made by the intermeddling creditors. They should not be directed to bring into Court the full value of the assets of the deceased which had come into their hands for the satisfaction of the plaintiff's debt.

I.L.R. 28 Mad. 350, referred to.

V. Govindarajachari for Petitioner.

Ch. Raghava Rao for Respondent.

G. S. V.

Burn and Stodart, JJ. C.M.A. Nos. 637 and 638 of 1938.
22nd February, 1939.

Civil Procedure Code (V of 1908), O. 38, r. 5—Application under—Conversion of an execution petition into—Propriety—No existence of personal decree—Dismissal of execution petition.

Where there was no personal decree but still an execution petition was filed for execution as if the decree were a personal decree,

Held, that the execution petition should be necessarily dismissed and could not be converted into an application under O. 38, r. 5 of the Civil Procedure Code.

P. Satyanarayana Rao and *M. Balakrishnamurthi* for Appellants.

G.S.V.

Abdur Rahman, J. C. M. A. No. 253 of 1937.
24th February, 1939.

Civil Procedure Code (V of 1908), S. 11, Expl. IV—Might and ought—Different grounds of attack—Both suits for ownership of same properties—First suit as members of joint family—Second suit as reversioners—If maintainable—Litigating under the same title.

H and his sons brought a suit against *H's* brother's widow and his son by a predeceased wife for partition and possession of properties, claiming as joint tenants of his deceased brothers. The suit was dismissed on the ground that the partition between *H* and his brothers had taken place before the suit. *H* died and a subsequent suit was brought by his two sons, who now based their title on their father being the nearest reversioner of his brothers and solely entitled as such to their properties.

Held, that the capacity of the plaintiffs was the same in both cases. The grounds of attack, *viz.*, the claim to have acquired properties either as survivors or heirs could have been joined in the same suit without any hindrance to the trial of the suit and could not be characterised as inconsistent but were merely alternative. The title which the plaintiffs claimed in both suits was that of ownership in regard to certain properties though for different shares and two grounds of the same title were successively put forward. The present plaintiffs were bound to include in their first suit the ground of attack which they put forward in the later suit and which was obviously within their knowledge. Not having done so, they could not be permitted to come to Court as reversioners, for the second time.

11 M.I.A. 50, 11 Beng. L.R. 158, I.L.R. 20 Cal. 79, A.I.R. 1925 P.C. 55, I.L.R. 46 Mad. 135 and I.L.R. 13 Lah. 195, referred to.

V. S. Narasimhachar for Appellant.

Kasturi Seshagiri Rao for Respondent.

G. S. V.

Lakshmana Rao, J. Crl. R. C. No. 938 of 1938.
3rd March, 1939.

Madras Suppression of Immoral Traffic Act (V of 1930), S. 5 (1)—Conviction of inmate of brothel—Legality of.

An inmate of a brothel cannot be convicted under S. 5 (1) of the Madras Suppression of Immoral Traffic Act.

V. L. Ethiraj (The Public Prosecutor) for the Crown.

G. S. V.

Lakshmana Rao, J. Crl. R. C. Nos. 914 and 915 of 1938.
8th March, 1939.

Child Marriage Restraint Act (XIX of 1929) and Criminal Procedure Code, S. 188 Proviso—Offence under the Child Marriage Restraint Act committed in French territory—Inquiry into charge—Essentials for.

Where an offence under the Child Marriage Restraint Act is alleged to have been committed in French territory, the charge cannot be inquired into in the absence of the certificate of the Political Agent or sanction of the Provincial Government.

D. Narasaraju for Petitioner.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Respondents.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

G. S. V.

Leach, C. J. and Patanjali Sastri, J. L.P.A. No. 80 of 1937.
15th March, 1939.

Specific Relief Act (I of 1877), S. 42 Proviso—Suit for declaration of title only as regards certain jewels—Jewels in the possession of Court—No prayer for consequential relief asked for—Suit if maintainable.

A plaintiff brought a suit for a declaration that he was the absolute owner of certain jewels which were in the possession of the Court of a Sub-Divisional Magistrate. No prayer for consequential relief was asked for.

Held, as the jewels were in *custodia legis*, at the time of the institution of the suit, all that was necessary was a declaration of title and the Court must deliver them to the person who shows title. It was not necessary for the plaintiff to ask for anything more than a mere declaration and the suit as framed is maintainable.

I.L R. 27 Mad. 591, I.L.R. 36 Mad. 62 and I.L.R. (1938) Lah. 63 (P.C.), relied on.

38 L.W. 194, disapproved.

K. Rajah Aiyar and *C. S. Krishnamurthi* for Appellant.

T. M. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for Respondent.

G. S. V.

Abdur Rahman, J. Check Slip No. 471 of 1936 in
17th March, 1939. C.M.A. No. 329 of 1938.

Court-Fees Act (VII of 1870), Sch. II, Art. 11—Preliminary decree passed in partition suit—Question of future mesne profits left open—Final decree passed and possession of properties taken by plaintiffs—Application under O. 20, r. 12 to enquire into future mesne profits—Rejection of—Appeal against order refusing to hold such enquiry—Court-fee payable—Order of rejection if amounts to a decree.

In a suit for partition and possession which also included a prayer for the grant of future mesne profits, a preliminary decree was passed. But the question of future mesne profits was ordered by the Court to be left open. The partition of property was followed by a final decree. After the plaintiffs obtained possession in execution of this decree, they applied to the Court under O. 20, r. 12 of the Civil Procedure Code, asking for an enquiry into the future mesne profits and for an order to direct the defendants to pay what was found to be due from them. This application was dismissed by the District Munsif. An appeal was preferred by the plaintiffs against this order to the District Judge and a court-fee of one rupee was affixed on the appeal.

Held, that the order rejecting the application does not fall within the definition of a 'decree' as defined in S. 2 (*d*) of the Civil Procedure Code. The plaintiffs cannot be required to estimate the value of the relief for future mesne profits either in the trial Court or in the appellate Court. The application made under O. 20, r. 12 or an appeal from an order rejecting that application cannot be regarded as having been made in or arising from an order in execution. The appeal was correctly valued under Art. 11 of Sch. II of the Court-Fees Act.

I.L.R. 53 Mad. 540, referred to.

K. Srinivasa Rao for Appellant.

J. V. Srinivasa Rao for Respondent.

K. R. Rama Aiyar for *The Government Pleader* (*B. Sitarama Rao*) for Government.

G. S. V.

Leach, C.J. and Patanjali Sastri, J. L. P. A. No. 74 of 1937.
16th March, 1939.

Partnership Act (IX of 1932), Ss. 69 (2) and 74—Conflict between—Suit by firm against defendant for a sum of money—Registration of firm during pendency of suit—Plaintiff if entitled to decree.

A firm filed a suit against a defendant claiming a certain sum as due from him. The firm had not been registered under the provisions of S. 58 of the Indian Partnership Act but during the pendency of the suit registration was effected. The defendant contended that the suit could not be maintained by reason of the non-compliance with the Act.

Held, that the suit should be decreed. The rights and remedies which accrued before the commencement of the Act are left entirely untouched. S. 69 (2) of the Act cannot apply but S. 74 prevails. S. 74 should not be read as being subordinate to S. 69 (2).

48 L.W. 81, I.L.R. 58 All. 495, 40 Bom.L.R. 1275 and A.I.R. 1938 Rang. 371, followed.

I.L.R. 62 Cal. 213, I.L.R. 15 Pat. 813 and I.L.R. 17 Lah. 275, not followed.

S. Ramachandra Aiyar for Appellant.

V. C. Veeraraghavan for Respondent.

G. S. V.

Newsam, J. C. R. P. No. 1074 of 1938.
17th March, 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 19 and 20—Application for stay of execution under S. 20 by the father and manager of joint family—Application under S. 19 not filed—Subsequent applications under Ss. 19 and 20 by his minor son represented by his mother—Maintainability of.

The judgment-debtor in a case was a joint family. The father and manager of that family filed a petition under S. 20 of the Agriculturists Relief Act and obtained stay of execution but failed to file an application under S. 19 for scaling down the debt. Later on, his minor son represented by his mother filed applications under Ss. 19 and 20 which were dismissed.

Held, that the order of dismissal was right. Every member of the joint family in succession cannot obtain 60 days' stay. The joint family is bound by any order passed on the application of any member or by any default committed by any member.

K. Srinivasa Rao for Petitioner.

P. Chandra Reddi for Respondent.

G. S. V.

N R C

Venkataramana Rao and Newsam, JJ. A. S. No. 49 of 1936.
24th March, 1939.

Hindu Law—Husband and wife—Denial of marriage by husband—If legal cruelty—If wife entitled to separate maintenance.

Where a husband denies to his wife her legally married status by asserting that she is not his wife, he is guilty of cruelty sufficient in law to entitle her to claim separate maintenance.

V. Govindarajachari for Appellants.

N. Rama Rao and *B. V. Ramanarasu* for Respondents.

G. S. V.

Somayya, J. C. R. P. No. 119 of 1938.
24th March, 1939.

Court-Fees Act (VII of 1870), S. 7 (v) and Sch. II, Art. 17-B—Suit to recover possession of the office of the managership in regard to a school—No relief asked for recovery of the possession of the school building and its endowments—Proper court-fee—Value for purposes of jurisdiction—Suits Valuation Act (VII of 1887), S. 4.

Where a plaintiff does not ask for recovery of possession of a school building and its endowments but asks merely for possession of the office of the managership,

Held, that the suit should be treated as one coming under Art. 17-B of the Second Schedule and not S. 7 (*v*) of the Court-Fees Act.

48 M.L.J. 571, explained as *obiter*.

I.L.R. 4 Mad. 147, relied on.

The relief of possession of the office of the managership is related to things which have a definite money value and the right to the managership certainly affects the right to be in possession of and to manage the institution and its properties. The value for the purpose of jurisdiction is the value of the properties affected.

K. Rajah Aiyar for Petitioner.

V. V. Srinivasa Aiyangar and *V. V. Ramadurai* for Respondents.

G. S. V.

Pandrang Row and Abdur Rahman, JJ.
13th March, 1939.

A. S. No. 312 of 1935.

Madras District Municipalities Act (V of 1920), Ss. 68 and 69—Auction by committee of Municipality—Defendant making the highest bid—Agreement signed by Chairman and others—Municipality sanctioning the agreement subsequently—Validity of agreement—Removal of rubbish by defendant in pursuance of agreement—If Municipality is entitled to relief—Contract Act, S. 65—Applicability.

In an auction held by the committee of a Municipality, the defendant gave the final bid. The agreement was signed by the Chairman and some of the members. It was not sanctioned by the Municipality until a few months after the expiry of the period for which the auction was held. In pursuance of the above agreement the defendant took delivery of the rubbish belonging to the Municipality. The Municipality sued the defendant for compensation for removing the rubbish.

Held, (1) that the sanction of the Municipality has to precede the making of a contract which exceeds Rs. 1,000 and the Council must be made aware not only of the matter in regard to which the contract would be entered into but also in regard to its terms and conditions. The highest bid of the defendant must be regarded as a mere offer. The agreement relied on by the municipality is not valid, nor can it be ratified subsequently.

(2) As the agreement was discovered to be unenforceable according to the rules laid down in Ss. 68 and 69 of the District Municipalities Act and was not illegal, S. 65 of the Contract Act comes into play. The Municipality is entitled to equitable relief under S. 65 of the Contract Act and the defendant must make compensation for removing the rubbish.

I.L.R. 29 Mad. 360 and I.L.R. 30 Mad. 290, not followed.

A.I.R. 1933 Mad. 145, I.L.R. 58 Mad. 65, 43 L.W. 39 and I.L.R. 45 All. 179 (P.C.), relied on.

M. Patanjali Sastri for Appellant.

K. Rajah Aiyar for Respondent.

G. S. V.

Somayya, J.
17th March, 1939.

C. C. C. A. No. 32 of 1937.

Civil Procedure Code (V of 1908), O. 18, r. 18—Local inspection made by Judge—Judgment based solely on the impression formed at the time of—No record made as to what was found at that time—Propriety of procedure.

N R C

A suit was filed for a declaration of the plaintiff's right to light and air to a room in her house. The trial judge made a local inspection and based his judgment solely on the impression formed by him at that time and came to a conclusion quite contrary to the evidence on the point. He did not make any notes of inspection and did not place on record what it was that he found on inspection so as to enable the appellate Court to come to an independent conclusion whether his decision was right.

Held, that the procedure adopted by the trial Court was wrong.

I.L.R. 39 Mad. 501 and A.I.R. 1931 Mad. 531, referred to.

M. N. Duraiswami Aiyangar for Appellant.

K. S. Narayana Aiyar for Respondent.

G. S. V.

Pandrang Row and Abdur Rahman, JJ. A. S. No. 125 of 1938.
20th March, 1939.

Madras Marumakkatayam Act (XXII of 1923), Ss. 41 and 43—Construction—'Tarwad' in S. 43 (4)—Registration of main tarwad as impartible—Tavazhi *of the tarwad possessing separate properties—Applicability of Chapter VI—Suit for partition of those properties—Maintainability.*

After a marumakkatayam tarwad has been registered as impartible under S. 43 of the Marumakkatayam Act, a *tavashi* of the tarwad is governed by the provisions of Ch. VI of the Act and a suit for partition of the separate properties of the *tavashi* is maintainable under S. 41.

'Tarwad' in S. 43 (4) means the tarwad which was actually registered as impartible and nothing more.

K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Appellants.

T. R. Venkatarama Sastri, A. Kuttisankara Menon, K. V. Gopalakrishnan Nair, M. Chinnappan Nair and *A. P. Kuttisankara Menon* for Respondents.

G. S. V.

King and Abdur Rahman, JJ. A. S. No. 77 of 1935.
25th January, 1939.

Hindu Law—Impartible estate—Illegitimate son of previous zamindar—If entitled to maintenance under Hindu Law.

In a suit for maintenance by the illegitimate son of the previous zamindar of an impartible estate,

Held, apart from special custom there is no right under Hindu Law for an illegitimate son to claim maintenance from an impartible estate. There is no coparcenary in an impartible estate.

Observations in 67 M.L.J. 274=L.R. 61 I.A. 286=I.L.R. 56 All. 468 (P.C.), treated as *obiter dicta* and distinguished as a case relating to succession.

35 M.L.J. 392=L.R. 45 I.A. 148=I.L.R. 41 Mad. 778 (P.C.), followed.

Sir Alladi Krishnaswami Aiyar and *S. Nagaraja Aiyar* for Appellant.

T. S. Swaminathan for Respondent.

K. S.

Venkataramana Rao and Newsam, JJ. A. S. No. 444 of 1935.
6th March, 1939.

Negotiable Instruments Act (XXVI of 1881), Ss. 9, 30 and 93—Hundi—Endorsement by payee—Transfer of debt by a letter—Undertaking given to bear the loss resulting from transfer—Suit by transferee against drawer of hundi—If hundi was taken with notice of dishonour—Liability of drawer's son.

The payee of a hundi endorsed it in blank and delivered it to the plaintiff after the hundi had been dishonoured by non-payment. Along with the delivery of the hundi to the plaintiff a letter was given by the payee to the plaintiff asking him to collect the hundi amount and pay himself the mortgage debt due by the payee to the plaintiff. At the time of transfer, he undertook that he would bear the losses resulting from the transfer. The plaintiff brought a suit against the drawer of the hundi who contended that he was not liable as the hundi was dishonoured by non-payment and no notice of dishonour was given to him.

Held, that it cannot be said that the endorsee was conscious that the hundi was dishonoured before he took the transfer. He cannot be deemed to have taken it with notice of dishonour. So he is a holder in due course and is entitled to enforce the hundi against the drawer.

N K C

There was a transfer of the debt apart from the hundi by reason of the letter and therefore the plaintiff can recover on the debt from the son of the drawer.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *T. M. Ramaswami Aiyar* for Appellant.

K. Rajah Aiyar and *S. Narasinga Rao* for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 620 of 1935.
21st March, 1939.

Civil Procedure Code (V of 1908), S. 11—Bar of res judicata *—Two suits tried together—Major suit including the subject-matter of the minor suit—Common judgment—Appeal preferred against the decree in the major suit but not against the other decree.*

Where there are two contemporaneous suits overlapping one another and disposed of by a common judgment and an appeal is filed only against the decree in the major suit which includes the whole of the subject-matter of the minor suit and is between the same parties, the decree in the minor suit against which no appeal is preferred cannot operate as *res judicata* in the appeal against the major decree.

S. A. No. 1643 of 1922 and I.L.R. 29 Mad. 333 (F.B.), followed.

I.L.R. 46 Mad. 895 (P.C.), referred to.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

K. Kameswara Rao for Respondents.

G. S. V.

Newsam, J. C. R. P. No. 909 of 1938.
31st March, 1939.

Civil Procedure Code (V of 1908), S. 132—Persons exempt from appearance in public—Nature of exemption—Appearance before Judge in a place chosen by him.

Persons who according to the customs and manners of the country ought not to be compelled to appear in public are exempt from appearance in public Court. But they are not exempt from appearing before the judge in a private place, which must be of his own choosing and within his discretion, not of their choosing.

Ch. Raghava Rao for Petitioner.

V. Rangachari for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 873 of 1935.
6th April, 1939.

Execution petition — Judgment-debtor's wife filing claim petition under O. 21, r. 57—Dismissal of execution petition—Legal representative of judgment-debtor filing fresh application—Fresh claim petition by judgment-debtor's wife successful—Petition whether barred.

R held a decree against *P* and in execution attached certain properties. *P's* wife *U* filed a claim petition but that was rejected. Then *R* died and the Court presumably acting on the view as held in I.L.R. 50 Mad. 1, dismissed the execution application in 1929. *R's* wife *A* filed another execution application and prayed for fresh attachment. *U* filed another claim petition which was successful. The lower courts held that since *U* did not file a suit under O. 21, r. 63, to set aside the order on her claim petition in *R's* attachment, she was barred from maintaining the present claim petition. In that view *A's* suit was decreed by both the Courts.

Held; that when the Court dismissed the execution application in 1929, it did not do so for statistical purposes but for the reason that the execution petition after *R's* death was not maintainable and *R's* legal representative must come by way of a fresh execution application. O. 21, r. 57 is not exhaustive of instances of cessation of attachment and hence the attachment did terminate on the dismissal of *R's* execution petition. In that view, *U* was not bound to file a suit to set aside the order dismissing her claim and the present claim petition in *A's* execution was not barred.

I.L.R. 50 Mad. 1 and I.L.R. 55 Mad. 352 (F.B.), referred to.

48 M.L.J. 616 and I.L.R. 56 All. 537 (F.B.), followed.

R. Visvanathan and *T. R. Srinivasan* for Appellant.

R. Desikan for Respondent.

K. C.

The Chief Justice and S. A. No. 404 of 1934.
Patanjali Sastri. J.
17th April, 1939.

Hindu Law—Adoption of daughter's son—Dispensing with datta homam—Whether texts permit.

The authenticity and authority of the text of Yama to the effect that 'the homa or the like is not necessary in the case of adoption of the daughter's son, or the brother's son; by the verbal

gift alone that is accomplished' have been accepted in a long course of decisions.

I.L.R. 2 Bom. 83, I.L.R. 6 All. 276, I.L.R. 24 Bom. 218, 20 C.W.N. 19, I.L.R. 17 All. 294, I.L.R. 21 All. 412 (P.C.) and I.L.R. 39 Bom. 441 (P.C.), referred to.

Hence, in order to establish a valid adoption of a daughter's son even in the case of a Brahmin family, the performance of datta homam is not essential. The contention that the text relates to a putrika putra and dwayamushyayana adoption negatived.

Per *Chief Justice.*—In view of the observation in I.L.R. 39 Bom. 441 at 465 (P.C.) and bearing in mind that in I.L.R. 11 Mad. 5 (F.B.) there was no express limitation of the decision in 4 M. H.C.R. 165, it is arguable that the latter decision which holds that datta homam is not essential for a valid adoption in any case still stands.

Per *Patanjali Sastri, J.*—As the prescribed ceremony has been held to be necessary to ensure to the adopted son competence to perform the obsequies with efficiency [I.L.R. 11 Mad. 5 at 9 (F.B.)] and as the daughter's son already possesses that competence [*vide* 48 L. W. 887 at 891 and I.L.R. 50 All. 375 at 390 (P.C.)], the adoption of a daughter's son without performance of datta homa is valid on that ground also.

K. S. Desikan for Appellant.

K. Rajah Aiyar, R. Visvanathan and *V. Ramaswami* for Respondent.

K. C.

Leach, C. J. and Patanjali Sastri, J. L.P. A., No. 41 of 1937.
17th April, 1939.

Hindu Law—Succession—Sons of unmarried woman—Father unknown—If descendants of the sons "sagothra sapindas".

A and *B* were the sons of *C*, an unmarried woman and it was not known who their father was. *B's* grandson died leaving his father's sister's sons and his mother who inherited his estate. *A's* son claiming to be a reversioner sued for a declaration that an alienation by the mother of *B's* grandson was not binding on the reversion.

Held, it being impossible to say that *A's* son and *B's* grandson were descendants of a common ancestor there is no *sagothra sapindaship* but only a cognate relationship and the paternal aunt's sons had a preferential claim to succeed.

8 M.I.A. 400, referred to.

45 L.W. 153=(1937) 1 M.L.J. 268, affirmed.

S. S. Ramachandra Aiyar for Appellant.

S. Ranganatha Aiyar for Respondent.

K. S.

Somayya, J. C. M. S. A. Nos. 38 and 39 of 1938.
28th April, 1939.

Provincial Insolvency Act (V of 1920), S. 4—Application under—Prior decision of Civil Court on same matter—Effect— Res judicata.

A creditor who had filed a suit against a father and his four sons obtained an order for attachment before judgment of all the family properties. The father applied for and got himself adjudicated insolvent shortly after the suit was decreed. After adjudication the decree-holder filed in 1929 a petition in the Munsif's Court to bring the attached properties to sale. Early in 1930 the Official Receiver sold some of the properties and applied for stopping the sale of the other properties in execution and for delivery of properties to him. The sale was stopped and the execution petition was struck off. Then the Insolvency Court directed the receiver after payment of the expenses of the decree-holder to distribute the balance among the creditors. The decree-holder filed a petition praying that the receiver be directed to remit to the Munsif's Court ⅘th of the sale proceeds representing the sons' shares. The receiver sent a letter to the Munsif saying that he had distributed the amount according to the order of the Insolvency Court and so could not comply with the prayer. The Munsif after hearing arguments held that the receiver should remit the sons' shares. The receiver moved the Insolvency Court

for directions and obtained an order that the decree-holder should apply to the Insolvency Court. The decree-holder did not do so but applied to the Munsif for committing the receiver for contempt. The receiver applied under S. 4 of the Provincial Insolvency Act to the Insolvency Court for a decision that the sons' shares vested in him and were not liable to be transferred to the Munsif's Court. The decree-holder opposed the petition but both the Subordinate Judge and the District Judge held in favour of the receiver. On appeal,

Held, the order of the Munsif directing the receiver to remit the ¼th share of sale proceeds was final and binding on the receiver. The receiver appearing in a Civil Court was only a suitor and not entitled to send a report but must file a counter affidavit or written statement. If he was dissatisfied with the Munsif's decision the proper course was to appeal and not to apply in the Insolvency Court under S. 4 of the Provincial Insolvency Act and in the proceedings in the Insolvency Court the Munsif's decision would be *res judicata*. The order of the Insolvency Court directing the decree-holder's expenses to be paid in priority did not negative his right to the sons' shares.

A. C. Sampath Aiyangar for Appellant.

K. V. Ramachandra Aiyar for the Official Receiver-Respondent.

K. S.

Wadsworth, J. S. A. No. 842 of 1935.
28th April, 1939.

Indian Contract Act (IX of 1872), S. 30—Pronote for losses incurred in gambling—If enforceable.

Where a pronote is executed for losses incurred in gambling there is no lawful consideration and it is void under S. 30 of the Indian Contract Act. Where the pronote is between the same parties it is in no sense collateral to the gambling and a suit on such a pronote is not maintainable.

V. Govindarajachari and *K. V. Gopalaswami* for Appellant.

P. Somasundaram and *B. V. Subramaniam* for Respondent.

K. S.

[END OF VOLUME.]